NO. 77985-6

SUPREME COURT OF THE STATE OF WASHINGTON

HERBERT NELSON, on his behalf and on behalf of all others similarly situated,

Respondent/Appellee,

v.

APPLEWAY CHEVROLET, INC., a Washington corporation, d/b/a APPLEWAY SUBARU/VOLKSWAGEN/AUDI, APPLEWAY ADVERTISING, APPLEWAY AUDI, APPLEWAY AUTOMOTIVE GROUP, APPLEWAY CHEVROLET LEASING, APPLEWAY GROUP, APPLEWAY MAZDA, APPLEWAY MITSUBISHI, APPLEWAY SUBARU, APPLEWAY TOWING, APPLEWAY TOYOTA, APPLEWAY VOLKSWAGEN, EAST TRENT AUTO SALES, LEXUS OF SPOKANE, OPPORTUNITY CENTER, and TSP DISTRIBUTORS; and AUTONATION, INC., a foreign corporation,

Petitioners/Appellants.

SUPPLEMENTAL BRIEF OF RESPONDENT/APPELLEE HERBERT NELSON

TOUSLEY BRAIN STEPHENS PLLC
Kim D. Stephens, WSBA #11984
Max E. Jacobs, WSBA #32783
Kimberlee L. Gunning, WSBA #35366
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101-1332
206.682.5600

PHILLABAUM, LEDLIN, MATHEWS & SHELDON, PLLC
Brian S. Sheldon, WSBA #32851
421 W. Riverside Avenue, Suite 900
Spokane, Washington 99201-0418
509.838.6055

Attorneys For Respondent/Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

I. INTRODUCTION

Washington's business and occupation tax ("B&O tax") statute states in plain language that the B&O tax is not a tax on consumers, that it is not collectible from consumers, and that it shall be part of a business's overhead:

> It is not the intention of this chapter that the taxes herein levied upon persons engaging in business be construed as taxes upon the purchasers or customers, but that such taxes shall be levied upon, and collectible from, the person engaging in the business activities herein designated and that such taxes shall constitute a part of the operating overhead of such persons.

RCW 82.04.500. The statute does *not* authorize retailers to assess B&O tax on individual transactions and collect the tax directly from consumers, yet that is exactly what Appellant Appleway Chevrolet, Inc. ("Appleway") did when Respondent Herbert Nelson purchased a car from an Appleway dealership. Appleway also levied sales tax on the B&O tax it charged Mr. Nelson.

Appleway admits that levying B&O tax directly on its customers was its uniform practice.[1] It calls this practice "itemization," claiming that all it is doing is "disclosing" to its customers the amount of B&O tax overhead that goes into the retail price for each transaction.[2] The Spokane

---

[1] It is Mr. Nelson's understanding that shortly after the Court of Appeals held Appleway's practice was contrary to Washington law, *see Nelson v. Appleway Chevrolet, Inc.*, 129 Wn. App. 927, 121 P.3d 95 (2005), Appleway stopped "itemizing" the B&O tax, pending this Court's decision.

[2] It is disingenuous for Appleway to label this practice "disclosure," since the amount of B&O tax Appleway pays the State, which is calculated on Appleway's gross proceeds, is different from the sum total of the amount Appleway charges on customer transactions.

County Superior Court, the Honorable Kathleen O'Connor presiding, had another word for Appleway's practice: "illegal."

The primary issue before this Court is whether Appleway's assessment of B&O tax on individual customer transactions and direct collection of the tax from customers is contrary to Washington law. Two secondary issues raised by Appleway — Mr. Nelson's standing to challenge Appleway's business practice and whether the Superior Court abused its discretion in certifying a class — ask this Court to determine the appropriate means by which Appleway's customers can challenge that business practice. Pursuant to RAP 13.7, Mr. Nelson submits this supplemental brief for the Court's consideration.

II. ARGUMENT

A. The Superior Court Did Not Err in Holding RCW 82.04.500 Prohibits Retailers from Assessing the B&O Tax on Individual Transactions and Collecting B&O Tax Directly from Consumers

1. This Court Should Decline Appleway's Invitation to Rely on Non-Washington Authority to Interpret RCW 82.04.500

This case presents an issue of first impression: whether a business's practice of assessing B&O tax on individual transactions and collecting the tax directly from purchasers and customers is lawful under the B&O tax statute, RCW 82.04 *et seq*. As the Superior Court acknowledged, no Washington court to date has decided this issue. RP 52:6 – 11 (8/13/04 Hearing).

In the absence of any such authority, Appleway urges the Court to rely on non-Washington authority interpreting other states' taxation schemes to determine if Appleway's business practice is contrary to

Washington law. *See, e.g.*, Appellants' Br. at 30–36. Reliance on non-Washington authority without addressing the underlying statutory structure, however, violates this Court's prohibition against relying on out-of-jurisdiction authority to interpret a Washington statute without first determining whether the underlying statutory language and structure correspond to relevant Washington statutory provisions. *See Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 942, 845 P.2d 1331 (1993) (declining to give weight to Florida case law submitted to support business's interpretation of provision of Washington B&O tax statute because "[t]he two states have taxation schemes sufficiently dissimilar to render Florida's case law inapplicable").

Here, none of the cases cited by Appleway to support its reading of RCW 82.04.500 reference a "taxation scheme" corresponding to Washington's, for the simple reason that the B&O tax is unique, as is Washington's taxation scheme generally. *See* CP 484, 491 (Department of Revenue Tax Reference Manual); *see also* Washington State Department of Revenue, "Washington's Tax System" (2004), http://dor.wa.gov/docs/reports/WA_Tax_System_ 11_17_2004.pdf ("2004 DOR Report").

Moreover, even if the non-Washington authorities Appleway urges the Court to consider construed a tax statute and a tax structure corresponding to Washington's, the issue before the Court — the legality of levying the B&O tax directly on consumers — differs from the issues considered in the non-Washington cases cited by Appleway. *See* Respondent's Br. at 20–21. As one example, Appleway cites *Texaco*

Refining & Mktg. Co., Inc. v. Comm'r of Revenue Services, a Connecticut case interpreting a Connecticut state statute imposing a gross earnings tax on the sale of petroleum products. *Texaco Refining*, 522 A.2d 771 (Conn. 1987). But in that case the court noted that based on a previous federal court decision, the tax in question could be collected directly from consumers. *See Texaco Refining*, 522 A.2d at 773 fn.5. In other words, the legality of the business's "itemization" was presumed by the court. *Id.* No such presumption is applicable here.

2. The Superior Court's Interpretation of RCW 82.04.500 Is Supported by the Plain Language of the Statute

The language of RCW 82.04.500 is unequivocal. The B&O tax is "not . . . to be construed as taxes upon purchasers or customers," and the tax "*shall* be levied upon, and collectible from, the person engaging in the business activities herein designated . . . ." RCW 82.04.500 (emphasis added). It is a well-settled principle of statutory interpretation that "[t]he word 'shall' in a statute . . . imposes a mandatory requirement unless a contrary legislative intent is apparent." *Erection Co. v. Dep't of Labor & Indus.*, 121 Wn.2d 513, 518, 852 P.2d 288 (1993).

This Court must give effect to the plain meaning of a statute "'as an expression of legislative intent.'" *Sheehan v. Cent. Puget Sound Reg'l Transit Auth.*, 155 Wn.2d 790, 797, 123 P.3d 88 (2005) (quoting *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9–10, 43 P.3d 4 (2002)). In addition to reviewing the language of the provision in question, the Court may ascertain the plain meaning by reviewing "'the statute in which the provision at issue is found, as well as related statutes

or provisions of the same act in which the provision is found.'" *Sheehan*, 155 Wn.2d at 797 (quoting *Campbell & Gwinn*, 146 Wn.2d at 10).

The Superior Court held that RCW 82.04.500 provides that "the cost of doing business, i.e. paying the B&O tax[,] indeed can be part of the operating overhead of the business. But what it does not say is that you can directly, by 'itemization,' pass it on to the consumer." RP 55:6 – 11 (8/13/04 Hearing). The Superior Court's interpretation of RCW 82.04.500 is consistent with the rest of the B&O tax statute, RCW 82.04 *et seq.* As the Superior Court noted, the B&O tax is not a transactional tax. RP 52:17–19 (8/13/04 Hearing). The taxable incident for retail businesses is the retailer's gross proceeds of sales, not an individual retail transaction. *See* RCW 82.04.250(1) (amount of B&O tax with respect to retailers "shall be equal to the gross proceeds of sales of the business, multiplied by the rate of 0.471 percent"). This unambiguous statutory provision underscores the Legislature's intent that the B&O tax not be levied on individual transactions.

Appleway's explanation of RCW 82.04.500's function within the B&O tax statute focuses on the first part of the provision — that the tax not "be construed as" a tax on purchasers or customers — and ignores additional language providing that the B&O tax must be "collected" from businesses, not consumers. Appleway claims the "construed" language evidences only the Legislature's intent that retailers not reduce their tax liability by charging their customers B&O tax and then subtracting the amount collected from customers from the retailer's gross proceeds subject to the tax. *See* Pet. for Review at 8 – 11. Apart from whether the

"construed" language in the statute serves that function or not — and Mr. Nelson does not concede that it does — the other language in RCW 82.04.500 (the tax is "levied upon and collectible from" businesses), read in combination with the "construed" language, provides that retailers cannot collect B&O tax directly from their customers. The Legislature could easily have drafted language stating that B&O tax could be levied on consumers but was not to be deducted from a retailer's gross receipts. But, it did not. Instead, the Legislature specified that not only was the tax not to be construed as a tax on customers, but also that the tax was not to be collected from them at all.

Moreover, if the only purpose of RCW 82.04.500 were to establish that the legal incidence of the B&O tax remains on businesses, then the statutory provision would be superfluous in light of other provisions of the B&O tax statute. For example, RCW 82.04.250, as noted above, provides that the taxable incident for retailers is gross proceeds of sales, and thus underscores that businesses remain responsible for paying the B&O tax. Sections of the B&O tax statute pertaining to specific business activities also highlight that it is Washington businesses which bear the responsibility for B&O tax on their gross proceeds, not customers or purchasers on individual transactions. *See, e.g.*, RCW 82.04.230 – .298 (listing B&O tax rate to be imposed on gross proceeds of different types of businesses).

3. The Superior Court's Interpretation of RCW 82.04.500 Is Supported by Public Policy

Washington State's taxation scheme is unique among the fifty states for its imposition of a comprehensive gross receipts tax on all businesses and its lack of a corporate or personal income tax. *See* CP 484, 491. As a result, businesses pay a higher share (as compared to households) of the total tax burden in Washington than do businesses in other states: 49.6 percent in Washington versus 33 percent in seven other Western states. *See* 2004 DOR Report. Washington businesses' obligation to pay B&O tax is largely responsible for this tax burden. *See id.*

As a 2004 Department of Revenue ("DOR") report indicates, the B&O tax has been criticized because it imposes a "heavy burden for firms with low profit margins and startups" and because it allegedly "[d]eters business investment" in the state. 2004 DOR Report. It is thus understandable that Appleway and other retailers doing business in Washington may wish to avoid the burden imposed by the B&O tax. At the same time, however, Washington consumers are already subject to one of the highest sales tax rates in the nation. *See* 2004 DOR Report. Allowing businesses to charge their customers B&O tax (and sales tax on the B&O tax) increases consumers' tax burden and permits retailers doing business in Washington to avoid their statutory obligation.

Mr. Nelson does not dispute that RCW 82.04.500 permits businesses to consider the B&O tax rate as part of their overhead. Nor does he dispute that businesses factor overhead costs into the retail prices

they charge consumers. But, RCW 82.04.500 prohibits businesses from levying the B&O tax on customers and purchasers directly.

Tinkering with the State's tax structure is a task for the Legislature, not Appleway or the Court. The Legislature's intent to distribute tax burdens between businesses and households, as illustrated by the plain language of RCW 82.04.500 and Washington's overall taxation scheme, should remain undisturbed unless and until the Legislature amends or eradicates the existing tax structure. Should this Court choose to disregard the clear mandate of RCW 82.04.500 and permit Appleway and other Washington businesses to collect B&O tax directly from consumers, the result will be a blurring of the clear line between the B&O tax (a privilege tax on businesses' gross receipts) and the retail sales tax (a transactional tax on consumers). The Legislature's decision as to which sectors of the Washington population should bear particular tax burdens will be rendered meaningless. If this Court chooses to condone Appleway's actions, Washington households should expect to pay an additional B&O transaction tax on every retail purchase, including food, clothing, and other life essentials. Nothing could be further from the Legislature's intent in enacting the B&O tax.

4. This Court Need Not Defer to the Department of Revenue's "Special Notice"

Both the Superior Court and the Court of Appeals correctly refused to defer to the interpretation of RCW 82.04.500 contained in a DOR "Special Notice." As the "final authority on statutory construction," this Court is free to reject an administrative agency's policy that "is neither

consistent with the plain language of [the statute] nor an official interpretation" of the statute in question. *Burton v. Lehman*, 153 Wn.2d 416, 426 n.4, 103 P.3d 1230 (2005) (quoting *Moses v. Dep't of Soc. & Health Services*, 90 Wn.2d 271, 274, 581 P.2d 152 (1978)).

Appleway has never addressed the fact that the Special Notice is not the product of formal rule-making or an adjudicative process. *See* Respondent's Answering Br. at 23–24. Nor has Appleway ever disputed the Superior Court's conclusion that interpretation of RCW 82.04.500 "is not well settled at the Department of Revenue level." CP 581. For example, a DOR "Business and Occupation Tax Fact Sheet," dated September 2004, explains that "[t]he B&O tax is a cost of doing business and should not be billed to your customer as a separately stated item (as is the sales tax)." CP 498.[3]

Appleway's claims aside, there is nothing in Washington law requiring deference to an informal agency opinion interpreting a statute when it is clear from agency publications that such an opinion is not the official, final word from the agency on the statute in question.

5. The Constitutional Issue Appleway Attempts to Raise Is a Red Herring

The constitutional concerns raised by Appleway on appeal are undeveloped and thus do not provide the Court with a basis for reversing the Superior Court's ruling. *See In re Disciplinary Proceeding of Schafer*, 149 Wn.2d 148, 168, 66 P.3d 1036 (2000) ("'[N]aked castings into the

[3] An updated version of this publication, dated August 2005, contains an identical admonition to businesses regarding the B&O tax. The August 2005 "Fact Sheet" can be found at http://dor.wa.gov/Docs/Pubs/ExciseTax/BO_PubUtil_LitterTax/BOfs.pdf.

constitutional sea are not sufficient to command judicial consideration and discussion.'") (quoting *State v. Blilie*, 132 Wn.2d 484, 493 n.2, 939 P.2d 691 (1997)). In briefing before the Court of Appeals, Appleway claimed that any prohibition on "disclosure" of the B&O tax would be "constitutionally questionable." Appellants' Br. at 40. Similarly, in its petition for review, Appleway broadly asserted that the Court of Appeals' interpretation of the statute forbids "disclosure" and therefore automatically violates the First Amendment. Pet. at 12.

As a threshold issue, Appleway has never demonstrated the conduct at issue is "speech" and thus potentially entitled to First Amendment protection. Nor has Appleway addressed the applicable four-part test this Court uses to determine whether restrictions on commercial speech are constitutionally permissible, as outlined in *Kitsap County v. Mattress Outlet/Kevin Gould*, 153 Wn.2d 506, 512–15, 104 P.3d 1280 (2005) (citing *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980)). This test "asks (1) whether the speech concerns a lawful activity and is not misleading, (2) whether the government's interest is substantial, (3) whether the restriction directly and materially serves the asserted interest, and (4) whether the restriction is no more extensive than necessary." *Mattress Outlet*, 153 Wn.2d at 512.

Here, assuming *arguendo* the Superior Court's interpretation of RCW 82.04.500 constitutes a "restriction on commercial speech" — and Mr. Nelson does not concede that it does — such a "restriction" is constitutional under the *Mattress Outlet/Central Hudson* test. First, the

"speech" concerns a lawful activity — retailers' payment of the B&O tax — and is not misleading because Appleway is not forbidden from disclosing to consumers that B&O tax is part of its overhead. The second prong of the *Central Hudson* test is satisfied because the State has a substantial interest in controlling the manner in which taxes are assessed and collected, as illustrated by the language of RCW 82.04.500 itself. The "restriction" serves this substantial government interest as it is the correct interpretation of the statute.

With regard to the fourth prong of the test, the "restriction" is no more extensive than necessary. The Superior Court's ruling does not prohibit Appleway from telling its customers that the dealerships' overhead costs include B&O tax, just as nothing prevents Appleway from explaining to its customers what other costs make up its overhead. Appleway is free to explain to its customers that its B&O tax liability and other business expenses affect retail prices. Rather, the Superior Court's ruling simply requires Appleway to refrain from assessing B&O tax on individual transactions and levying the tax directly on consumers. In sum, there is nothing in the Superior Court's ruling that mandates against "preserving the free flow of commercial information." *See Mattress Outlet*, 153 Wn.2d at 512.

Finally, if Appleway has constitutional concerns about RCW 82.04.500's restrictions on "disclosure," these concerns should be addressed to the Legislature. "Issues of disclosure" were not ruled on by the Superior Court, which noted that any such concerns were "policy decision[s]" not in the province of the courts:

> Should the consumer have an opportunity to see an itemized B&O tax that has a relationship to the amount of money they're spending as opposed to an average B&O tax. I don't know. That is not my call. That is a policy decision, that is a question properly addressed to the legislature . . . . Obviously, disclosure is a critical issue for consumers but it isn't relevant to what I have to decide. You might have the absolutely best disclosure policy you can imagine and it doesn't make an illegal practice legal.

RP 55:18–24; 56:16–21 (8/13/04 Hearing). This Court's review is limited to those issues actually ruled upon by the Superior Court, not issues the Superior Court declined to consider. The issue before Judge O'Connor in Spokane County Superior Court was whether Appleway's business practice was contrary to Washington law, not whether Appleway's self-described "disclosure" of the B&O tax was a consumer-friendly practice.

B. The Superior Court Did Not Err in Holding That Mr. Nelson Has Standing to Seek a Declaratory Judgment Interpreting RCW 82.04.500

Appleway challenges Mr. Nelson's standing to seek a declaratory judgment as to the meaning of RCW 82.04.500 and whether Appleway's practice of charging customers directly for the tax is contrary to the laws of the state of Washington. Appleway ignores that Washington's Declaratory Judgments Act ("DJA") "is to be liberally construed and administered." RCW 7.24.120. Appleway disregards the plain language of the DJA providing that any person "whose rights, status, or other legal relations are *affected* by a statute . . . may have determined *any question of construction or validity* arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder."

RCW 7.24.020 (emphasis added). Appleway pays no heed to long-standing Washington case law holding that economic interest is sufficient for standing to bring a declaratory judgment action. *See, e.g., Casey v. Chapman*, 123 Wn. App. 670, 676, 98 P.3d 1246 (2004) (citing *Yakima County Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 379, 858 P.2d 245 (1998)); *see also* 15 Tegland, WASHINGTON PRACTICE: CIVIL PROCEDURE § 42.2 (1st ed. 2003 & 2005–2006 Supp.) (citing *Heavens v. King Co. Rural Library Dist.*, 66 Wn.2d 558, 514 P.2d 137 (1973)). And, Appleway chooses to discount that this Court takes a "less rigid and more liberal approach to standing" when a controversy involves matters of "substantial public importance," including issues with "a direct bearing on commerce." *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 803, 83 P.3d 419 (2004).

Rather than meeting the unambiguous language of Washington's DJA head-on, Appleway asks this Court to graft another prerequisite for obtaining a declaratory judgment onto the existing standing requirements by arguing that Mr. Nelson must establish a private cause of action under RCW 82.04.500 in order to challenge Appleway's illegal practice of collecting B&O tax directly from its customers. This is a prerequisite not supported by the facts of this case or by Washington law. As did the Superior Court before it, this Court should disregard Appleway's argument.

Appleway claims that because the B&O tax statute itself provides no express cause of action for Mr. Nelson to challenge Appleway's illegal practice, Mr. Nelson has no standing to proceed against Appleway unless

he can establish a private cause of action under RCW 82.04.500. *See* Pet. at 14. Appleway's argument fundamentally mischaracterizes the nature of Mr. Nelson's claim. None of the causes of action alleged in Mr. Nelson's complaint are pled as violations of the B&O tax statute. *See* CP 4 – 12. To the contrary, Mr. Nelson asked the Superior Court to issue a declaratory judgment that Appleway's assessment and collection of B&O tax is "contrary to the laws of the State of Washington." CP 9 – 10. Mr. Nelson also requested further relief under the DJA in the form of restitution for the funds Appleway illegally collected from Mr. Nelson and the Class. CP 10 – 11.

The private cause of action test referenced by Appleway is used when a plaintiff relies on a statute or regulation as the basis for a negligence action. *See* 16 DeWolf & Allen, WASHINGTON PRACTICE: TORT LAW & PRACTICE § 1.21 (2nd ed. 2000 & 2006 Supp.) ("A statute or regulation which by its terms creates a duty to individuals can be the basis for a negligence action"). This Court's most recent decision applying this test, *Sheikh v. Choe*, confirms that it is relevant only when a plaintiff seeks tort damages based on the defendant's breach of a duty owed to the plaintiff. *See Sheikh*, 156 Wn.2d 441, 457, 128 P.3d 574 (2006) (applying three-part test to determine if defendant Department of Social and Health Services "had a duty, established by administrative regulation, to protect the public by providing mental health and substance abuse treatment" to perpetrators of assault on plaintiff; plaintiff sought tort damages for "negligent failure to provide treatment").

Nowhere in Mr. Nelson's complaint does he seek damages resulting from Appleway's breach of a duty to Mr. Nelson and the Class. *See* CP 4 – 12. Nor did Mr. Nelson ask the Superior Court to determine if Appleway had breached a duty owed to Mr. Nelson and the Class. *Id.* In sum, Mr. Nelson did not ask the trial court to *enforce* RCW 82.04.500; he asked the court to *interpret* the statute and declare its meaning. While Mr. Nelson requested further relief in the form of restitution (assuming the court entered a declaratory judgment to the effect that Appleway's direct collection of B&O tax was contrary to law), he did not seek tort damages from Appleway. And, as the Superior Court was careful to note, the issue of damages was not before the court, nor did the Court rule on whether Mr. Nelson and the Class were entitled to monetary relief. *See* RP 56:22–24; 57:3–9 (8/13/04 Hearing); CP 386–89.

Appleway also claims that Mr. Nelson fails to satisfy the *Grant County* two-part standing test, but this argument similarly fails. In *Grant County*, the Court held that a party seeking a declaratory judgment must show (1) "whether the interest sought to be protected is arguably within the zone of interests to be protected or regulated by the statute" and (2) "whether the challenged action has caused injury in fact, economic or otherwise, to the party seeking standing." *Grant County*, 150 Wn.2d at 802 (internal citations and marks omitted). Here, RCW 82.04.500 explicitly references "purchasers" and "customers," indicating the Legislature's concern with consumers' interests and intent that the B&O tax remain the responsibility of businesses, not their customers. With regard to the second prong of the test, Mr. Nelson has been adversely

affected by having to pay a tax that is not his responsibility. *Grant County* specifically holds that the "injury in fact" may be "economic or *otherwise*." *Grant County*, 150 Wn.2d at 802 (emphasis added). As noted above, the issue of damages was not before the Superior Court. *See* RP 56:22–24; 57:3–9 (8/13/04 Hearing); CP 386–89. As Judge O'Connor noted, "[a]t this juncture, whether or not Mr. Nelson or other people similarly situated have suffered damages, again, doesn't define whether or not the practice is illegal." RP 57:3–6 (8/13/04 Hearing).

Were the Court to hold that Mr. Nelson lacks standing to seek a declaratory judgment as to the meaning of RCW 82.04.500 and the legality of Appleway's conduct, Mr. Nelson would be left without a remedy. Mr. Nelson is not using the DJA to circumvent an existing enforcement mechanism established by the Legislature. Rather, Mr. Nelson is relying on the Court's power to interpret the B&O tax statute in the absence of such an enforcement mechanism.

C. The Superior Court Did Not Abuse Its Discretion When It Certified the Class Pursuant to CR 23(b)(2)

A trial court's class certification ruling is a fact-dependent determination, reviewed by this Court for abuse of discretion. *Lacey Nursing Ctr., Inc. v. Dep't of Revenue*, 128 Wn.2d 40, 47, 905 P.2d 338 (1995). When, as here, the trial court "considered all the criteria of CR 23" and did so on the record, a class certification order should be affirmed. *Lacey Nursing Ctr.*, 128 Wn.2d at 47; CP 374–82; 582.

Appleway claims this case is "ineligible" for class certification under CR 23(b)(2) because Mr. Nelson and the Class seek restitution of

the funds Appleway charged consumers for B&O tax and B&O sales tax. *See* CP 10–11, referencing RCW 7.24.080 ("Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper"). A request for monetary relief, however, is not an automatic bar to CR 23(b)(2) certification. *See Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 252, 63 P.3d 198 (2003). CR 23(b)(2) certification is permitted when "the monetary damages sought are merely incidental to the primary claim for injunctive or declaratory relief." *Sitton*, 116 Wn. App. at 252. Appleway suggests that whether damages are "incidental" is somehow dependent on the aggregate amount of class damages. Appleway also asserts that individualized factual differences in the Class members' negotiations with Appleway render CR 23(b)(2) certification inappropriate.

The purpose of the "incidental damages" rule is to ensure that *should* individualized inquiries need to be made regarding class members' monetary damages, class members will be afforded due process by being given notice and the right to opt out to pursue individualized resolution of their claims. *See Sitton*, 116 Wn. App. at 253. This is precisely why "incidental damages" are defined as damages which are "capable of computation by means of objective standards and not . . . dependent in any significant way on the intangible, subjective differences of each class members' circumstances." *Sitton*, 116 Wn. App. at 252–53.

Due process concerns, however, arise only when determination of a class member's damages turns on individualized factual or legal issues. That is not the case here. The record contains no facts to support

Appleway's allegations that individualized factual or legal issues exist. *See* Resp. Br. at 44. When certifying the class, the Superior Court could only consider the facts before it — not hypothetical scenarios raised by Appleway for the first time on appeal. Indeed, not only did the Superior Court find that "all of the issues, both legal and factual, relating to [Appleway's] conduct and its effects are common to the Class as a whole," satisfying CR 23(a)(2)'s commonality requirement, but the Superior Court also held that Mr. Nelson's claims "are typical of the Class as a whole." CP 377. As the Superior Court noted, damages in this case are "fairly simple and easy to ascertain." RP 103:24–25 (8/13/04 Hearing). This case is "unlike the physical injury or personal injury kinds of cases or even extensive property damages type of property classes like *Firestorm* . . . [W]hat's being requested is: Here's a class member, here's the documentation they signed. Here is the item on the B&O line and the B&O 'sales tax.'" RP 103:16–23.

Appleway's conduct — assessing B&O tax on individual transactions and collecting the tax directly from consumers — is identical with respect to Mr. Nelson and the Class. Differences in the types of vehicles consumers purchased from Appleway, which Appleway dealerships consumers patronized, what consumers were told by Appleway's agents about the B&O tax and at what point in the transaction the B&O tax was discussed do not alter the illegality of the practice and do not affect the amount of restitution Appleway might be required to pay to Mr. Nelson and the Class. By engaging in a business practice that is contrary to Washington law, Appleway has "acted . . . on grounds

generally applicable to the class," thereby making declaratory relief appropriate. CR 23(b)(2).

Appleway's practice of assessing B&O tax on individual transactions and collecting the tax directly from consumers results in identical injury to every Class member. Each Class member paid a charge that Washington law does not allow Appleway to collect directly from its customers. "Disclosure" and other subjective factual questions play no part in this analysis.

Moreover, as the Superior Court recognized, Washington courts have discretion to enter "appropriate orders" safeguarding class members' right to due process. CP 582; *see* CR 23(d)(2) (court may make orders "requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action"); CR 23(e) (class must be given notice of a proposed dismissal or settlement). The Superior Court did not abuse its discretion in certifying the class.

III. CONCLUSION

Mr. Nelson respectfully requests that the Court affirm the Superior Court's summary judgment and class certification orders, and remand this

case to the Superior Court with instructions that this matter proceed consistent with those orders.

RESPECTFULLY SUBMITTED this 21st day of August, 2006.

TOUSLEY BRAIN STEPHENS PLLC

By: _____
Kim D. Stephens, WSBA #11984
Max E. Jacobs, WSBA #32783
Kimberlee L. Gunning, WSBA #35366

PHILLABAUM, LEDLIN, MATHEWS & SHELDON, PLLC
Brian S. Sheldon, WSBA #32851
421 W Riverside Ave., Ste. 900
Spokane, Washington 99201-0418
509.838.6055

CERTIFICATE OF SERVICE

I, Juliet Albertson, declare and say as follows:

1. I am a citizen of the United States and resident of the state of Washington, over the age of 18 years, not a party to the above-entitled action, and am competent to be a witness herein. My business address and telephone number are 1700 Seventh Avenue, Suite 2200, Seattle, Washington 98101, 206.682.5600.

2. On August 21, 2006, I caused a true and correct copy of the foregoing document to be personally delivered to the following parties in the manner indicated at the addresses listed below.

Brian S. Sheldon
PHILLABAUM, LEDLIN, MATHEWS & SHELDON, PLLC
421 West Riverside Ave., Suite 900
Spokane, WA 99201-0418
Fax: 509.625.1909

Co-Counsel for Respondent/Appellee

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivered via Messenger Service
- ☐ Overnight Courier
- ☒ Facsimile
- ☐ Electronic Transmission

Stephen M. Rummage
DAVIS WRIGHT TREMAINE LLP
1500 Fourth Ave., Suite 2600
Seattle, WA 98101

and

Gregg R. Smith
GREGG R. SMITH, ATTORNEY AT LAW
905 West Riverside Ave., Suite 409
Spokane, WA 99201-1099
Fax: 509.838.3955

and

Daniel F. Katz
Luba Shur
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, NW
Washington D.C. 20005
Fax: 202.434.5029

Attorneys for Petitioners/Appellants

- ☐ U.S. Mail, postage prepaid
- ☒ Hand Delivered via Messenger Service
- ☐ Overnight Courier
- ☒ Facsimile
- ☐ Electronic Transmission

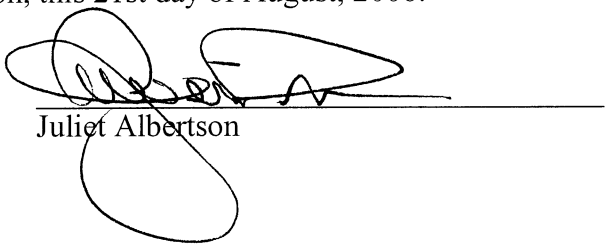
- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivered via Messenger Service
- ☐ Overnight Courier
- ☒ Facsimile
- ☐ Electronic Transmission

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivered via Messenger Service
- ☐ Overnight Courier
- ☒ Facsimile
- ☐ Electronic Transmission

Jill D. Bowman STOEL RIVES LLP 600 University St., Ste. 3600 Seattle, WA 98101-3197 Fax: 206-386-7500 *Attorneys for Amici Curiae Camp Automotive, Inc. and Lithia Motors, Inc.*	☒ U.S. Mail, postage prepaid ☐ Hand Delivered via Messenger Service ☐ Overnight Courier ☒ Facsimile ☐ Electronic Transmission
Kimberley Hanks McGair FARLEIGH WITT 121 SW Morrison St., Ste. 600 Portland, OR 97204 Fax: 503.228.1741 *Attorneys for Amicus Curiae Charter Communication LLC*	☒ U.S. Mail, postage prepaid ☐ Hand Delivered via Messenger Service ☐ Overnight Courier ☒ Facsimile ☐ Electronic Transmission
Michael B. King Linda B. Clapham LANE POWELL PC 1420 5th Ave Ste 4100 Seattle, WA 98101-2338 Fax: 206.223.7107 *Attorneys for Amicus Curiae Association of Washington Business*	☒ U.S. Mail, postage prepaid ☐ Hand Delivered via Messenger Service ☐ Overnight Courier ☒ Facsimile ☐ Electronic Transmission

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

EXECUTED at Seattle, Washington, this 21st day of August, 2006.



Juliet Albertson